BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDY K. FLYNN	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,762
GARDEN PLACE NURSERY, INC.	)	
Respondent	)	
AND	)	
	)	
MILLERS MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

The Workers Compensation Fund requested review of the Award dated June 9, 1997, entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on November 4, 1997.

APPEARANCES

James D. Wenger of Clay Center, Kansas, appeared for the claimant. Trish Rose of Hutchinson, Kansas, appeared for the respondent and its insurance carrier. Matthew B. Works of Topeka, Kansas, appeared for the Workers Compensation Fund (Fund).

RECORD AND STIPULATION

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

For the period before January 1, 1996, the Administrative Law Judge awarded claimant benefits for a 10 percent permanent partial general disability. For the period commencing January 1, 1996, the Administrative Law Judge awarded claimant benefits for a 49.5 percent work disability. The Workers Compensation Fund requested the Appeals Board to review the following issues:

(1) What is claimant's average weekly wage?

(2) What is the nature and extent of claimant's disability?

(3) Does K.S.A. 1992 Supp. 44-501(c) preclude claimant from receiving permanent partial general disability benefits?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) The parties stipulated that claimant sustained a series of mini-traumas to her back which culminated in personal injury on April 24, 1993. The parties also stipulated that the accidental injury arose out of and in the course of claimant's employment with respondent.

(2) The parties stipulated claimant sustained a 10 percent whole body functional impairment as a result of her work-related back injury.

(3) The respondent corporation is a family-owned nursery and garden center which was started by claimant's father-in-law in 1930. Claimant began working for respondent in 1970.

(4) Claimant's husband owns 51 percent interest of the respondent corporation and his two brothers own the remaining 49 percent. As the only shareholders, claimant's husband and his brothers determine whether respondent pays an annual bonus and makes such determination based upon the corporation's profitability. Respondent paid claimant a $1700 bonus in December 1992. Before 1992, bonuses were paid on an irregular basis. Claimant did not receive a bonus in 1993, 1994, or 1995. As of September 18, 1996, when claimant last testified, claimant had not received a bonus for 1996.

(5) On the date of accident, claimant was earning $6 per hour and regularly working 40 hours or more per week. For the six-month period before the April 24, 1993, accident, claimant earned a total of $2,453.20 in overtime wages, or an average of $94.35 per week.

(6) Claimant was paid every two weeks. During the year before her accident, claimant received overtime pay almost every two-week period. On six occasions, claimant worked between 30 and 40 hours in overtime for the two-week pay period and on another four occasions, worked over 40 hours for the pay period. During the year before her accident, claimant averaged approximately 12 hours per week of overtime.

(7) After undergoing chiropractic treatment and physical therapy which did not resolve her back pain, in January 1994 claimant consulted board-certified neurosurgeon Ali B. Manguoglu, M.D. Based upon a functional capacity assessment and Dr. Manguoglu's testimony, the Appeals Board finds claimant should observe the following permanent work restrictions and limitations: limit occasional lifting to 30 pounds or less, limit carrying to no greater than 25 pounds, limit stand-up lifting to 15 pounds and overhead lifting to 10 pounds, limit pushing to 31 pounds and pulling to 51 pounds, and avoid bending and twisting at the waist. In addition, claimant should limit her activities to those where she can alternate sitting, standing, and walking. Based upon Dr. Manguoglu's testimony, the Appeals Board also finds claimant retains the ability to water the plants at the nursery, perform secretarial duties, drive short distances, and perform the duties of a sales clerk as long as she is not required to violate the doctor's restrictions against repetitive twisting or lifting greater than 30 pounds.

(8) Claimant continued to work for the respondent after her injury. However, claimant now works fewer hours and performs the less strenuous secretarial duties. Beginning January 1996, claimant reduced her hours to between 30 and 40 hours per week depending upon how she felt. As of September 1996 when claimant last testified, claimant was earning $7.50 per hour and working only 30 hours per week. Also, as of September 1996, claimant continued to take muscle relaxers and pain medication as prescribed by her doctor. Claimant testified she reduced her hours because she was not able to tolerate working more. However, the fact that no physician has ever recommended that claimant limit the number of hours she works per week contradicts the claimant's testimony in this regard.

(9) Following the April 1993 accident, claimant's income has steadily declined. In 1992 and 1993 claimant earned $21,220 and $19,810, respectively. In 1994 and 1995 claimant earned $19,319 and $16,200, respectively.

(10) For the period through December 31, 1994, the Appeals Board finds that claimant, after initially recovering from the April 1993 injury, earned a wage comparable to or more than what she was earning on the date of accident As indicated by claimant's yearly earnings, claimant earned an average of $380.96 per week in 1993 and $371.52 per week in 1994. In 1995 claimant's average weekly wage declined to $311.54 per week. Therefore, for the period commencing January 1, 1995, claimant began to earn less than a comparable wage. The Appeals Board finds the actual wages claimant earned in1995 adequately demonstrates her wage-earning ability for that period.

(11) Claimant has a 66 percent loss in her ability to perform work in the open labor market. That finding is based upon the testimony and opinion of vocational rehabilitation counselor Monty Longacre who utilized the permanent restrictions and limitations which Dr. Manguoglu placed upon claimant and considered the open labor market within a 60-mile radius of Abilene, Kansas, claimant's hometown. The Appeals Board is mindful that vocational rehabilitation counselor Bud Langston testified that claimant had a 40 to 45 percent loss of access to the open labor market. However, Mr. Langston considered the entire state of Kansas as claimant's potential labor market. The Appeals Board is more persuaded by Mr. Longacre's opinion because he considered the open labor market for the area around

claimant's hometown. In this instance, the Appeals Board finds the labor market in the Abilene area provides a better gauge to determine claimant's loss as it is the area to which claimant has ready access.

(12) For the period from January 1, 1995, through December 31, 1995, claimant has a 7 percent loss in her ability to earn a comparable wage. As indicated below, the Appeals Board finds claimant's average weekly wage on the date of accident was $334.35. Comparing claimant's 1995 average weekly wage of $311.54 to $334.35 yields a 7 percent difference. For the period commencing January 1, 1996, the Appeals Board finds claimant retains the ability to earn $300 per week which is based on claimant's present $7.50 hourly rate and a 40-hour work week. Therefore, commencing January 1, 1996, claimant has a 10 percent loss in her ability to earn a comparable wage.

CONCLUSIONS OF LAW

(1) Claimant's average weekly wage is $334.35 which is comprised of $240 per week regular time and $94.35 per week for overtime. The bonus which claimant received in 1992 is not included in the average weekly wage computation because it has not been discontinued. Before 1992 the bonus was paid on an irregular basis contingent upon the company's profits and that policy has continued. *See* K.S.A. 1992 Supp. 44-511(a)(2).

(2) Because hers is an "unscheduled" injury, the computation of permanent partial general disability is governed by K.S.A. 1992 Supp. 44-510e which provides in pertinent part as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

For the period from April 24, 1993, through December 31, 1994, respondent provided claimant with accommodated employment which paid a wage comparable to what she was earning on the date of accident. Therefore, the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e applies and claimant's permanent partial disability is limited to her 10 percent functional impairment rating until January 1, 1995.

For the period from January 1, 1995, through December 31, 1995, claimant no longer earned a wage comparable to what she was earning on the date of accident and, therefore, the presumption of no work disability no longer applies. Considering both the 7 percent loss

of ability to earn a comparable wage and the 66 percent loss of ability to perform work in the open labor market, the Appeals Board finds claimant has a 37 percent permanent partial general disability for the period in question. Although not required, the Appeals Board has given equal weight to both losses.

For the period commencing January 1, 1996, considering both the 10 percent loss of ability to earn a comparable wage and the 66 percent loss of ability to perform work in the open labor market, the Appeals Board finds claimant has a 38 percent permanent partial general disability as a result of her April 1993 back injury.

(3) The Workers Compensation Fund has requested the Appeals Board to consider whether K.S.A. 1992 Supp. 44-501(c) would preclude claimant from receiving permanent partial general disability benefits on the basis that claimant did not miss the requisite time from work. The Appeals Board finds that neither the respondent nor the Fund raised K.S.A. 1992 Supp. 44-501(c) as a defense or as an issue for the Administrative Law Judge to decide. Generally, issues may not be raised for the first time before the Appeals Board. *See* K.S.A. 44-555c, as amended, which limits the Appeals Board's jurisdiction to review only those questions of fact and issues of law which were raised before the Administrative Law Judge.

The Administrative Law Judge took stipulations on August 28, 1996. The parties, including the Workers Compensation Fund, were given the opportunity to identify additional issues which the Administrative Law Judge did not identify. However, none of the parties requested the Administrative Law Judge to determine whether claimant was disabled for the requisite period from earning full wages from her work as required by K.S.A.1992 Supp. 44-501(c) either at the hearing when stipulations were taken or in their submission letters.

The Appeals Board finds the parties failed to properly identify K.S.A.1992 Supp. 44-501(c) as either an issue or defense and, therefore, the Administrative Law Judge did not address it. Further, because the issue was not raised before the Administrative Law Judge, the Appeals Board will not consider it for the first time on this appeal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated June 9, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Judy K. Flynn and against the respondent, Garden Place Nursery, Inc., and its insurance carrier, Millers Mutual Insurance Co., for an accidental injury which occurred April 24,1993, and based upon an average weekly wage of $334.35. Claimant is entitled to 88.14 weeks at the rate of $22.29 per week or $1,964.64, for a 10% permanent partial general disability for the period April 24, 1993, through December 31, 1994; followed by 52.14 weeks at the rate of $82.48 per week or $4,300.51, for a 37% permanent partial general disability for the period from January 1,

1995, through December 31, 1995. For the period commencing January 1, 1996, claimant is entitled to 274.72 weeks at $84.70 per week or $23,268.78, for a 38 percent permanent partial general disability, making a total award of $29,533.93.

As of December 31, 1997, there is due and owing claimant 88.14 weeks of permanent partial general disability compensation at the rate of $22.29 per week in the sum of $1,964.64, 52.14 weeks at the rate of $82.48 per week in the sum of $4,300.51, and 104.29 weeks at the rate of $84.70 per week, in the sum of $8,833.36, for a total of $15,098.51, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $14,435.42 is to be paid for 170.43 weeks at the rate of $84.70 per week until fully paid or further order of the Director.

Pursuant to stipulation, the Workers Compensation Fund is assessed one-half the compensation and costs associated with this Award.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of January, 1998.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

I respectfully disagree with the majority in two major respects. First, under K.S.A. 1992 Supp. 44-511 the bonus claimant received in December 1992 should be included in the average weekly wage computation. Claimant did not receive a bonus in 1993, 1994, 1995, or 1996. With respect to those years, the bonus was discontinued. The speculation that respondent might pay a bonus in the future is irrelevant. Therefore, I find claimant's average weekly wage is $367.04 which includes $32.69 per week for bonus.

Secondly, I disagree with the majority's determination that claimant retains the ability to earn $300 per week or $7.50 per hour for a 40-hour week. The majority, without justification, has disregarded claimant's uncontroverted testimony that she remains on prescription muscle relaxers and pain medications and is presently unable to work more than 30 hours per week because of her back injury. Claimant's testimony is credible and should not be disregarded.

"Uncontroverted evidence cannot be disregarded . . . unless it is improbable or unreasonable or is shown to be untrustworthy. Ordinarily, uncontroverted evidence is regarded as conclusive." In the Matter of Doe, 19 Kan. App. 2d 204, 866 P.2d 1069 (1994).

Based upon credible, uncontroverted testimony (which cannot be ignored), I find claimant's post-injury ability to earn wages should be based on a 30-hour rather than 40-hour workweek. Therefore, I find claimant retains the ability to earn $225 per week for the period commencing January 1, 1996. Comparing $225 to $367.04, claimant's loss of ability to earn a comparable wage is 39 percent rather than the 10 percent determined by the majority, making claimant's ultimate work disability 53 percent.

BOARD MEMBER

C: James D. Wenger, Clay Center, KS
Trish Rose, Hutchinson, KS
Matthew B. Works, Topeka, KS
Bryce D. Benedict , Administrative Law Judge
Philip S. Harness, Director